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Supreme Court, U.S.
FILED
JUN 4 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1702

In The

Supreme Court of the United States

October Term, 1989

THE MENNEN COMPANY, et al.,

Petitioners,

-vs-

ANDREW S. MARTIN,

Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This case arises from charges of age discrimination filed by Andrew S. Martin after The Mennen Company refused to upgrade his position from grade level 14 to grade level 15 in January of 1986.

After filing discrimination charges with state and federal administrative agencies, Martin filed a complaint in the New Jersey Superior Court alleging, *inter alia*, (1) disparate treatment based on the denial of the upgrade in 1986 and (2) a continuing violation of the ADEA stemming from the company's salary evaluation system.

The Mennen Company removed Martin's state complaint to the United States District Court, District of New Jersey, which assumed jurisdiction pursuant to 29 U.S.C. §626(c) and 28 U.S.C. §1331. Thereafter, the matter was brought before a United States Magistrate on Mennen's motions for summary judgment. On August 17, 1988, the magistrate granted partial summary judgment dismissing plaintiff's claim of a continuing violation of the ADEA, and denied plaintiff Martin's motion to compel discovery. (App. B, *infra*). On June 14, 1989, the magistrate granted summary judgment dismissing Martin's claim of disparate treatment based upon the denial of the upgrade in 1986. (App. C, *infra*). Martin appealed the magistrate's rulings to the United States Court of Appeals for the Third Circuit as provided by 28 U.S.C. §636(c)(3). The Third Circuit reversed the magistrate's rulings in all respects. (App. A, *infra*).

The Mennen Company moved for rehearing and for rehearing *en banc*. The Court denied the motion on March 27, 1990. (App. D, *infra*).

In reaching her decision to dismiss Martin's disparate treatment claims, below, the magistrate failed to make any findings whatsoever concerning Martin's allegations of direct evidence constituting proof of discriminatory animus sufficient to establish a prima facie case for ADEA purposes. Instead, the magistrate founded her opinion solely upon her conclusion that Martin had failed to establish all elements of a prima facie case of age discrimination under the test enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Upon exercising plenary review, the United States Court of Appeals for the Third Circuit determined that the magistrate had erred by disregarding direct evidence of discriminatory animus sufficient to satisfy the plaintiff's burden of establishing a prima facie case of age discrimination under the ADEA. (App. A, *infra*, at 9a). The Third Circuit also found that, even assuming *arguendo*, direct evidence had not been presented, the plaintiff met his burden of proof under the test devised by *McDonnell Douglas v. Green*, and its progeny, which is intended to permit a plaintiff, in the absence of direct "smoking gun" evidence, to establish a prima facie case.

For the reasons set forth hereafter, it is respectfully submitted that the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit be denied.

ARGUMENT OF LAW

POINT I

THE PETITIONERS HAVE FAILED TO SET FORTH GROUNDS SUFFICIENT TO WARRANT THE GRANT OF A WRIT OF CERTIORARI

As set forth more fully in Points II and III of this brief, *infra*, the petitioners have failed to demonstrate any grounds upon which certiorari should be granted.

The most glaring deficiency in petitioners' brief becomes evident on a review of Point III of their legal argument. Petitioners assert that the Third Circuit either ignored the District Court's rulings on plaintiff's evidentiary failings or, in the alternative, reversed the District Court on the basis of counsel's bare citation to deposition transcripts. These allegations are made in support of petitioners' contention that the Third Circuit "departed from the accepted and usual course of judicial proceedings so as to call for an exercise of the Court's power of supervision." U.S. Sup. Ct. R. 10.1(a). The petitioners' contentions, however, are based upon pure misstatement of fact. As more fully set forth in Point II, the Third Circuit neither disregarded evidentiary rulings of the magistrate nor relied on bare citations to deposition transcripts. The contentions of the petitioners center upon the depositions of Michael Oravec and Janet Malcolm. The magistrate below refused to consider testimony from those depositions because the deposition transcripts had not been appended to the brief below. (App. C, *infra*, at 40a). The petitioners are well aware that the Third Circuit did not consider any testimony of Oravec or Malcolm because those transcripts and any references to them in Martin's

brief were voluntarily excluded by Martin following objection by petitioners' counsel prior to submission of the brief and appendix. (App. E, *infra*, and App. F, *infra*). Petitioners herein flirt with the disingenuous. Petitioners' counsel is clearly aware that the Third Circuit's finding that Michael Oravec, a younger co-employee, was reclassified as grade level 15, was not based on any citation to the Malcolm or Oravec depositions or disregard of the magistrate's rulings. Instead, that ruling was based upon that evidence which was replete in the record below and on appeal. This fact was repeatedly set forth in the deposition testimony of Andrew Martin which was appended to *petitioners'* brief in support of their motion for summary judgment as well as accepted as a finding of fact by the magistrate in her first opinion granting summary judgment. (App. B, *infra*, at 17a).

In light of the foregoing deficiencies, petitioners have failed to support their request for a writ of certiorari. Moreover, because the petitioners' criticism on the *McDonnell Douglass* issue relies on blatant misstatements, the Third Circuit's determination that respondent has met his burden of proof on the basis of the *McDonnell Douglas* test stands uncontested for purposes of Supreme Court review. The Court need inquire no further into the arguments of the petitioners herein.

As set forth more fully in Point III, *infra*, petitioners take substantial liberties with the factual record below as that record pertains to Mr. Scalia's involvement in this matter. Petitioners' conclusionary statements concerning the role played by Mr. Scalia in the decisionmaking process essentially amount to an attempt by petitioners to

reargue factual issues which were considered by the courts below.

Finally, petitioners' contention that the standard of direct evidence as applied by the Third Circuit is not in accord with standards applied by other courts of appeal does not rise to the level of the rendering of a decision " . . . in conflict with the decision of another United States Court of Appeals on the same matter." U.S. Sup. Ct. R. 10.1(a). In fact, neither the Third Circuit nor the Eleventh Circuit differ on the appropriate inquiry for assessing a prima facie case under the ADEA. Both rely on the well settled principles enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). *See, Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir. 1987) and *Carter v. City of Miami*, 870 F.2d 578 (11th Cir. 1989).

It is respectfully submitted that the semantic argument of petitioners on the question of what constitutes direct evidence is rendered insignificant when considered in light of the arguments above and at Point II, *infra*, that respondent has established a prima facie case, by circumstantial evidence. Accordingly, the extraordinary relief sought by petitioners is wholly unwarranted.

POINT II

THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT PROPERLY FOUND THAT THE RESPONDENT, ANDREW MARTIN, HAD ESTABLISHED A PRIMA FACIE CASE OF AGE DISCRIMINATION PURSUANT TO THE *MCDONNELL DOUGLAS* TEST, BY THE PROFFER OF CIRCUMSTANTIAL EVIDENCE WHICH WAS SUBSTANTIATED IN THE RECORD

Petitioners, in an effort to present an issue worthy of certiorari, have blatantly misrepresented the ruling of the United States Court of Appeals for the Third Circuit with regard to the finding that plaintiff, Andrew Martin, proved a prima facie case pursuant to the *McDonnell Douglas* test through the use of circumstantial evidence. Petitioners contend that the court of appeals either ignored the District Court's rulings on plaintiff's evidentiary failings or reversed the District Court on the basis of plaintiff's counsel's bare citation to deposition transcripts which were not part of the record before the District Court. This is absolutely untrue. In fact, the Third Circuit refused to consider certain testimony included in Martin's brief on appeal (the deposition testimony of a Mennen employee, Barbara Colgan) because the deposition transcript had not been attached to the brief submitted below. (App. A, *infra*, at 12a, n.2.) The petitioners' allegation that the findings of the Third Circuit necessarily relied on evidence that could not be considered pursuant to Federal Rule of Appellate Procedure 10A is therefore misplaced. Petitioners simply refuse to accept the fact that the Third Circuit applied a test to the facts before them with which petitioners disagree.

It is uncontested that plaintiff Martin was (1) a member of the protected class; (2) qualified for an upgrade; and (3) denied an upgrade. It is the Third Circuit's consideration of the final criterion of the *McDonnell Douglas* inquiry which petitioners criticize. The Third Circuit included as a footnote the following, "In any event, Martin would have met the requisite prongs of the *McDonnell Douglas* test since he produced evidence that Michael Oravecs [sic], then a 34 year old, was reclassified as a grade XV, thereby showing that younger co-workers were treated more favorably." (App. A, *infra*, at 9a-10a, n.1).[1] Petitioners have consistently maintained that Oravec's grade reclassification does not satisfy the remaining prong of the *McDonnell Douglas* test. Petitioners insist that since the plaintiff was seeking a grade level increase for his existing position, he was required to establish, in the fourth prong of the *McDonnell Douglas* test, that younger co-workers "in comparable positions" were treated more favorably in that their positions were upgraded. From that point, petitioners make the quantum leap to suggest that since the magistrate found no competent evidence in the record upon which to conclude that plaintiff had proven that younger co-workers "in comparable positions" were treated more favorably, the Third Circuit must have relied on evidence not properly in the record,

---

[1] The petitioners cannot and do not contend that the Third Circuit improperly concluded that Oravec was reclassified to grade level 15 because the record below was replete with this fact. This evidence was repeatedly discussed in the deposition testimony of Martin which was made a part of the record by petitioners, who incorporated Martin's deposition transcripts into their brief in support of summary judgment below.

to wit, the deposition transcripts of Oravec and Malcolm. In point of fact, neither the Oravec or Malcolm depositions were included in the appendix provided to the Third Circuit nor was any reference made to that testimony in the brief on appeal.

The petitioners adamantly refuse to accept the fact that the Third Circuit either: (1) refused to accept the petitioners' contentions concerning the proofs necessary to satisfy the fourth element of the *McDonnell Douglas* test; or (2) accepted plaintiff's arguments based on evidence properly in the record before them. Those arguments centered around the Exempt Performance Appraisal Summary prepared by Scalia on October 24, 1985 and submitted to Human Resources. As set forth in Point III, *infra*, Fadden, the individual who made the final determination as to Martin's upgrade request, conceded that Scalia was in the best position to know Martin's responsibilities, not he. Scalia, in the aforesaid Exempt Performance Appraisal Summary, specifically stated that Andrew Martin's current position should be upgraded to grade level 15. That document was not only signed by Scalia as the appraiser but also by Marcus, Sichel and Horne, Scalia's superiors, as approvers. This recommendation by Scalia approved by Sichel, Marcus and Horne *ipso facto*, is tantamount to their determination that Andrew Martin's position and job duties were comparable to any member of The Mennen Finance Department who was graded at level 15, including Oravec and any other younger member of the Finance Department. The Third Circuit, therefore, had competent evidence in the record before them to substantiate the fact that Martin's position was comparable to that of the younger members of the

Finance Department who were graded at level 15 and, therefore, by definition, were treated more favorably.

Petitioners seem to lose sight of the remedial purposes of the ADEA and the facilitative role of the *McDonnell Douglas* test:

> The prima facie case method established in *McDonnell Douglas* was 'never intended to be rigid, mechanized or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983), citing *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978), quoting *Teamsters v. United States*, 431 U.S. 324, 325 n.15 (1977). Whether the determination of the Third Circuit was that the plaintiff met his burden as to the last prong of the *McDonnell Douglas* test (in this case, simply by proving that a younger coworker outside the protected class was treated more favorably) or they accepted the arguments of plaintiff that the statements contained in the Exempt Performance Appraisal Summary were tantamount to proof that Martin's position was comparable to any other grade level 15 employee, including the younger employees in that grade level, it is respectfully submitted that such a determination was well within the province of the Third Circuit, " . . . in light of common experience as it bears on the critical question of discrimination." *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). That determination was, in either instance, reached by reliance on evidence properly in the record before the Third Circuit and not, as the petitioners would have the

Court believe, as the result of the Third Circuit's inattention to District Court rulings or unexplained reliance on materials not in the record before them.

POINT III

THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT'S DETERMINATION THAT THE RESPONDENT, ANDREW S. MARTIN, HAD ESTABLISHED A PRIMA FACIE CASE OF AGE DISCRIMINATION BY SUBMISSION OF DIRECT EVIDENCE OF DISCRIMINATORY ANIMUS WAS FULLY SUPPORTED BY THE RECORD BEFORE THEM

In conducting plenary review on summary judgment rulings, the Third Circuit certainly reviewed the facts in a light most favorable to Martin as the non-moving party. *Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706 (3d Cir. 1978), *cert. denied* 439 U.S. 966 (1978). The question to be considered in an ADEA claim is "whether the evidence could support an inference that the employer did not act for non-discriminatory reasons, not whether the evidence necessarily leads to that conclusion that the employer did act for discriminatory reasons." *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir. 1987).

The United States Supreme Court's determination in *Price Waterhouse v. Hopkins*, ___ U.S. ___, 109 S.Ct. 1775 (1989) did nothing to change the aforesaid inquiry as it relates to plaintiff's burden of proof as to his or her prima facie case. To the contrary, the force and effect of *Price Waterhouse* was to require that a defendant employer, in a mixed motive discrimination case, bear the burden of persuasion that its actions would have been the same in the absence of illegitimate criteria, once the aggrieved

plaintiff has established direct evidence of discrimination. Recognizing this Court's determination in *Price Waterhouse*, the Third Circuit acknowledged that the proofs in the record before them had, in fact, established that discriminatory animus was a substantial factor in the employment decision made by The Mennen Company thereby triggering the purposes of the ADEA. Having reviewed the record before them in a light most favorable to the non-moving party, the Third Circuit concluded that the magistrate had erred *inter alia*, in requiring Martin to establish a prima facie case on the basis of the *McDonnell Douglas* outline when there was direct evidence from which a reasonable jury could find discriminatory intent. (App. A, *infra*, at 9a).

A brief review of some of the salient facts presented to the Court clearly establishes the spurious nature of petitioner's allegations regarding the quality of that evidence.

A. SCALIA, THE DECISIONMAKER

The record before the Court below and the Third Circuit is replete with evidence that William Scalia, plaintiff's superior, was inextricably involved in the decision-making processes at The Mennen Company. In 1979, Martin directed a request for an upgrade of his job classification to Scalia. Scalia effectively refused to submit a request for upgrade on Martin's behalf, threatening Martin that he should not "push his luck" because, according to Scalia, Martin was to have been fired in 1974. Scalia also claimed that he had fought Martin's firing and had written job reviews which were, in his opinion, more

favorable than were warranted. Additionally, Scalia stated in that written document, "I don't expect you to work like a kid looking for a promotion, but I do expect you to help me and protect me – to work as hard for me as I have worked for you." Read as a whole, the foregoing memorandum constitutes direct evidence, in Scalia's own handwriting, that he was involved in the decisionmaking processes at The Mennen Company. No other possible interpretation could be placed on the wording, "you were to be fired in 1974. I prevented that". Read literally, "I don't expect you to work like a kid looking for a promotion . . . " leaves no room for the necessity of inference or presumption as discussed in the decisions of the Court of Appeals, Eleventh Circuit referred to by the petitioners, in particular, *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550 (11th Cir. 1988). To the contrary, if believed, such a statement proves the fact that Scalia did not expect older employees to work toward promotion, something he did expect from younger employees. Would there be any question as to the discriminatory intent of this statement if Mr. Martin was a black man and the comment had been, "I don't expect you to work like a white man looking for a promotion . . . "?

Again in 1980, Scalia prepared a performance appraisal for Martin which was submitted to Human Resources as part of the summary evaluation attendant to the Exempt Employee Appraisal. That document, which reviewed the employee's status, commented on his development and proposed various changes in employee benefits. The document contains Scalia's comment, " . . . despite Andy's age, he continues to work hard . . . " That appraisal form was signed by William Scalia as

appraiser and approved by Leonard J. Sichel, chief financial officer of The Mennen Company and M. Marcus, Vice President of Human Resources. Such statements are not the random comments of an employer made in the heat of the moment or in a nonchalant manner. They are the product of William Scalia's premeditated, intentional thought, reduced to writing and introduced into the decisionmaking processes at The Mennen Company. Finally, consider the Third Circuit's appropriate reliance on Martin's claims that Scalia had told him several times during performance reviews that the company treated younger employees more favorably in order to get them to remain with the company.

The Court is also respectfully requested to consider the testimony presented in the record by Michael Fadden, the individual who ultimately made the determination concerning Martin's requested upgrade. Fadden testified in depositions (which were part of the record before the courts below) that Scalia was in the best position to know of Martin's responsibilities and that Fadden had discussions with Scalia concerning those responsibilities prior to making his determination. Further, consider Fadden's testimony that Scalia received, edited and then revised job descriptions that were prepared by his subordinates prior to submission to the Department of Human Resources for final determination. Such activities are hardly associated with a non-decisionmaker. To the contrary, the evidence submitted in the record below indicates that William Scalia was an essential figure in the decisionmaking processes involving members of the Finance Department at The Mennen Company, that he was the best

person to know of the job responsibilities of those individuals and that his input and opinions were integral to the decisionmaking processes.

B. SCALIA, THE CONSPIRATOR

The petitioners have gone to great lengths in their brief to point out that William Scalia was the person who, in 1985, twice submitted Martin's upgrade request with his support to the Department of Human Resources. What is left out of petitioners' brief are the facts surrounding Mr. Scalia's change of heart and what ostensibly were his affirmative efforts on Mr. Martin's behalf. As discussed in the record below, Mr. Martin approached Mr. Scalia in 1984 during which time he advised Scalia that he believed his job classification was entitled to an upgrade and further advised Scalia that if The Mennen Company did not think his job should be upgraded, perhaps the EEOC would. It was only in response to that threat that Scalia, a graduate of the Brooklyn Law School, finally submitted a request for upgrade in Martin's job grade classification. In the ensuing Exempt Performance Appraisal Summary submitted by Scalia as appraiser and signed by Messrs. Sichel, Marcus and Horne as approvers, Mr. Martin's position was, for the first time, described as being entitled to a grade level 15 classification. The question which clearly must be asked is whether this constituted a good faith effort on the part of Scalia, Sichel, Horne and Marcus or whether it was an attempt to cover up a conspiratorial motive. Consider for instance that the Exempt Performance Appraisal Summary provided in part that Martin's present job responsibilities

should be reclassified as grade level 15. M. Marcus, the head of Human Resources, signed that document as approver. Yet Fadden, Marcus' subordinate, handed down the determination denying the upgrade. Was this a truly independent determination by Fadden or the product of a preconceived effort to insulate Scalia, Marcus, Sichel and Horne from threatened litigation by suggesting that the employment decision was Fadden's alone? To put it another way, this effort appears to have been nothing more than pretext. Consider this question in light of the Third Circuit's determination that on the record before them, a jury question existed as to whether the petitioners proffered "legitimate non-discriminatory rationale" was "unworthy of credence and therefore pretextual." (App. A, *infra*, at 10a-11a).

Clearly, substantial questions exist as to what the actual motives of these parties were. However, no question exists under the foregoing set of facts that William Scalia was an essential figure in the decisionmaking processes which affected Andrew Martin.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Petition for Writ of Certiorari to review the decision of the United State Court of Appeals for the Third Circuit be denied.

Respectfully submitted,

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BY: /s/ Salvatore P. DiFazio
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DATED: June 1, 1990

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5571

ANDREW S. MARTIN,
ANNA D. MARTIN

v.

THE MENNEN CO., GEORGE S. MENNEN,
L. DONALD HORNE, LEONARD J. SICHEL,
and WILLIAM C. SCALIA

Andrew S. Martin,
Appellant

Appeal from the United States District
Court for the District of New Jersey
(D.C. Civil No. 87-2546)

ARGUED
January 29, 1990
Before: STAPLETON and MANSMANN,
Circuit Judges,
and KOSIK, *District Judge.**
FEB 27 1990

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*Honorable Edwin M. Kosik of the United States District Court for the Middle District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

In this appeal from a grant of summary judgment for the employer on an age discrimination claim based on a refusal to upgrade a position of employment, and dismissal of a claim of continuing age discrimination, the plaintiff has presented direct evidence from which a reasonable jury could conclude that age was a factor in the employment decision. Because we conclude that the magistrate erred by requiring the plaintiff to meet all prongs of the *McDonnel-Douglas v. Green* test, even in the face of direct evidence, we will vacate the magistrate's grant of summary judgment. In addition, we conclude that the magistrate erred by dismissing the continuing discrimination claim while discovery was still pending. We will remand to the district court for appropriate proceedings.

I.

On summary judgment, we review the facts in a light most favorable to the non-moving party. *Princeton Univ. Phone Book, Inc. v. Bate*, 582 F.2d 706 (3d Cir.), *cert. denied*,

439 U.S. 966 (1978). Andrew Martin, now age 64, was hired by the Mennen Company in 1964 as a Chief Accountant, a position classified as Grade XIV. Although his job title was changed to Accounting Manager in 1967, Martin's job responsibilities remained the same until 1970, during which time he regularly received favorable job reviews. On or about that year, Mennen reorganized the finance department. Because Mennen created new specialized positions and hired new employees, Martin was relieved of some of his duties. Martin's job grade classification, however, remained at Grade XIV.

In August of 1973, Martin's duties were further reduced, which he claims resulted in a substantial loss in responsibility equivalent to a demotion. Martin's job grade classification, however, remained unchanged. At that time Martin also began to report to the Director of Corporate Finance, William Scalia. Five months after the reduction in responsibilities, Martin's application for an upgrade to the position of International Controller was denied. The reason allegedly given for the denial was that Martin was not creative and that his "chemistry" did not fit with the new finance group. Martin did not believe, at the time, that age was a factor in either the reduction in responsibility, or denial of the upgrade.

In 1979, Martin again requested an upgrade of his job classification. The request, directed to Scalia, was for an upgrade of his current position, unlike his previous request which was an application for a new position. Scalia allegedly advised Martin not to push the request because, according to Scalia, Martin was to have been fired in 1974. Scalia also claimed that he had fought against Martin's firing, and had written job reviews which were more

favorable than were warranted, in his opinion. Additionally, Scalia stated that he expected Martin to work as hard for him as he had for Martin, but Martin need not work like a "kid looking for a promotion." In the following year Scalia prepared a performance appraisal for Martin which stated "despite Andy's age, he continues to work hard and puts in long hours when necessary . . . ". Martin also claims that Scalia told him younger employees at Mennen were treated more favorably than older employees.

In 1985, Martin again requested an upgrade of his job classification. At Scalia's request, Martin prepared a job description of his position which Scalia submitted to the personnel department for evaluation. Michael F. Fadden, Director of Compensation and Benefits, evaluated Martin's position by reviewing the job description and interviewing both Martin and Scalia. Fadden then compared his evaluation of Martin's position with a salary consulting service known as the Salary Informational Retrieval System (SIRS), which is published by Organizational Resource Counselors, Inc. SIRS groups jobs with comparable duties and their corresponding salaries to enable subscribers to ensure the competitiveness of their salary structure. Based on his evaluation and the comparison, Fadden concluded that Martin's position could not properly be graded above a Grade XIV. Fadden reviewed his findings with Jerry J. Miller, then Vice President of Employee and Community Relations. Miller agreed with Fadden and wrote a letter to Scalia informing him of the decision not to upgrade Martin's position. Another request to evaluate Martin's position for an upgrade, filed by Scalia to Fadden, was denied late in 1985 based on the

fact that Martin's responsibilities had not changed since the earlier evaluation. In January of 1986, Scalia advised Martin that he had been turned down for the upgrade.

Early in 1986, a 34 year old co-worker of Martin was promoted from Grade XIV to Grade XV and Martin claims that around that time Fadden tried to induce him to retire. Martin then investigated Mennen's payroll records and concluded that younger employees in the Finance Division had been either hired at grade levels above his own or had been offered job level upgrades as part of a systematic effort to retain younger employees "at the expense of older employees."

In mid-1986 Martin filed a complaint with the EEOC alleging age discrimination for the failure to upgrade his job position in early 1986. Martin also filed a complaint with the New Jersey Division of Civil Rights and with the Superior Court of New Jersey alleging a violation of the Age Discrimination in Employment Act (ADEA). The EEOC determined that it would not proceed with Martin's charge, and Mennen removed the suit to the U.S. District Court for the District of New Jersey. By consent of the parties, the case was referred to a U.S. Magistrate.

In August of 1988, the Magistrate denied Mennen's motion for summary judgment on the 1986 discrimination claim, holding that the motion was premature because several depositions had yet to be taken. The magistrate rejected Mennen's motion despite the lack of a Fed. R. Civ. P. 56(f) affidavit because this circuit has considered Rule 56(f) claims without an affidavit in several circumstances. However, the court granted Mennen's motion for summary judgment on the claims before 1986, rejecting

application of the continuing violation theory, since Martin only alleged the 1986 discrimination in his EEOC complaint and had failed to show any factual support for the proposition that Mennen discriminated against older workers as a class. Based on its pretrial grant of summary judgment on the earlier claims, the court denied Martin's cross-motion to compel discovery of documents prior to 1982. The magistrate also denied the individual defendants' motion for summary judgment, finding a substantial identity between them and Mennen.

In June of 1989, Mennen again moved for summary judgment on the 1986 claim, which was granted by the magistrate. The magistrate held that Martin had failed to establish all the elements of a prima facie case of age discrimination, in that he had failed to show that non-members of the protected class (i.e., younger workers) in comparable positions were treated more favorably than he. Martin appeals.

Our review of a magistrate's order granting summary judgment is plenary. Summary judgment should only be granted when the non-moving party has failed to adduce sufficient evidence to create a genuine issue of material fact. Fed. R. Civ. P. 56. *See Siegel v. Alpha Wire Corporation*, No. 89-5674 (3d. Cir. January 12, 1990). We review the magistrate's decision to rule on the initial motion for summary judgment, absent a Rule 56(f) affidavit, and limit discovery to the period after 1982 for an abuse of discretion.

II.

In *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir. 1987), we held that a plaintiff could establish a case of age

discrimination under the ADEA, 29 U.S.C. § 621 *et. seq.* (1982), through either direct or indirect evidence. We further noted that in most cases direct evidence of the employer's intent to discriminate would be unavailable. For a plaintiff claiming wrongful discharge, we stated that:

> *In the absence of direct evidence* a plaintiff may establish a prima facie case of discrimination by proving by a preponderance of the evidence that (1) he belongs to a protected class; (2) he was qualified for the position; (3) he was dismissed despite being qualified; and (4) ultimately was replaced by a person sufficiently younger to permit an inference of age discrimination. (Emphasis added.)

Chipollini v. Spencer Gifts, Inc., 814 F.2d at 897.

This four part test was developed from the Supreme Court opinion in *McDonell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), and forms the first prong of a complex allocation of burdens of proof outlined in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The allocation is as follows:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employer's rejection." [Citation omitted.] Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 252-53. The prima facie case requirements, and the shifting burdens of production, allow the plaintiff to rely on "assumptions about the behavior of employers." *Chipollini v. Spencer Gifts. Inc.*, 814 F.2d at 897. In addition to establishing the prima facie case by indirect evidence, "a plaintiff can prevail by means of indirect proof that the employer's reasons [for the discharge or failure to promote] are pretextual." *Chipollini*, 814 F.2d at 898. Similarly, the plaintiff can overcome the employer's proffered reason for discharge or failure to promote by producing direct evidence that a discriminatory motive influenced the employer. *Chipollini*, 814 F.2d at 898.

Here, Mennen stipulated that Martin is a member of a protected class and that he was denied an upgrade. Martin's evidence of his qualifications for an upgrade consisted of the fact that some of the duties he originally performed had been parceled out to others in the 1971 reorganization, and the high job performance reviews he had received from his superiors. Although the magistrate initially found that Martin had failed to demonstrate that he was qualified for an upgrade, she later held that since Scalia and other Mennen managers had recommended the upgrade, Martin was qualified.

The elaborate three prong test devised to assist plaintiffs with a lack of direct evidence is unnecessary in the case here, where there exists direct evidence to suggest an intent to discriminate. Several statements made by Martin's own supervisor suggest that age could have been a factor in the decision not to upgrade Martin's job. Statements such as: "despite [his] age, he continues to work hard and puts in long hours when necessary," and "I

don't expect you to work like a kid looking for a promotion", indicate that age could be a substantial factor in the decision made by Mennen. In addition, Martin claims that his immediate supervisor, William Scalia, had told him several times during performance reviews that the company treated younger employees more favorably in order to get them to remain in the company. Thus, in the context of age discrimination, the question is one of "whether the evidence could support an inference that the employer did not act for nondiscriminatory reasons, not whether the evidence necessarily leads to that conclusion that the employer did act for discriminatory reasons." *Chippolini*, 814 F.2d at 900.

As Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989) stated:

> Where an individual disparate treatment plaintiff has shown by a preponderence of the evidence that an illegitimate criterion was a *substantial* factor in an adverse employment decision, the deterrent purpose of the statute has clearly been triggered. More importantly, as an evidentiary matter, a reasonable factfinder could comclude that absent further explanation, the employer's discriminatory motivation "caused" the employment decision.

Price Waterhouse, 109 S. Ct at 1798. We conclude that the magistrate erred by requiring Martin to establish his prima facie case on the basis of the *McDonnell-Douglas* factors when there was direct evidence from which a reasonable jury could find discriminatory intent.[1]

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[1] In any event, Martin would have met the requisite prongs of the *McDonnell-Douglas* test since he produced

(Continued on following page)

Because the magistrate found that the prima facie case had not been established, the magistrate determined it was unnecessary to consider whether Mennen had advanced a legitimate non-discriminatory rationale for its decision or whether Martin could show that the rationale was a pretext. Since we conclude that sufficient facts were alleged from which a prima facie case was established, Martin must be allowed to produce evidence that Mennen's denial of an upgrade based on the SIRS evaluation is "unworthy of credence and therefore pretextual." Martin's evidence consists of statements by Fadden acknowledging the possibility that the SIRS system could be manipulated. Additionally, Martin's expert, Dr. Russell, stated that the use of SIRS was an improper evaluation method.

In *Graham v. Leopold*, 779 F.2d 170 (3d Cir. 1985), we stated that the court should not make its own inferences from the evidence, but rather should determine whether "a jury could reasonably have inferred" that there was illegal discrimination. Graham, 779 F.2d at 173. Moreover, in *Siegel v. Alpha Wire Corp.*, No. 89-5674 (3d Cir. January 12, 1990), we once again explained that it was error for the district court to draw inferences from the evidence and resolve issues of fact more properly left to the jury to decide. *Siegel*, slip op. at 11. Clearly, the jury should be entitled to draw inferences about whether Mennen's reasons for refusing to upgrade Martin were pretextual.

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evidence that Michael Oravecs, then a 34 year old, was reclassified as a grade XV, thereby showing that younger coworkers were treated more favorably.

III.

Martin also argues that the magistrate erred by dismissing his continuing discrimination claim while discovery was still outstanding and by limiting discovery to the post 1982 period on the failure to upgrade claim of discrimination. Mennen contends that Martin's failure to file a Rule 56(f) affidavit precluded the magistrate from ruling on Martin's request for additional discovery. While it is generally understood that in order to oppose a motion for summary judgment on the basis that further discovery is necessary the non-moving party must file an affidavit stating the nature of the discovery sought and its relevance to the motion, the magistrate correctly noted that we have considered Rule 56(f) claims without the filing of affidavits. *See e.g., Mid-South Grizzlies v. National Football League*, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984) (arguments contained in response brief can be read as Rule 56(f) affidavit). By considering Martin's moving papers and his comments at oral argument in opposition to the summary judgment motion as a Rule 56(f) affidavit, the magistrate examined the individual claims to see if further discovery was warranted. Under these circumstances, the magistrate did not abuse her discretion by reviewing the claims in the absence of a Rule 56(f) affidavit. The magistrate did err, however, by concluding that Martin had failed to allege sufficient facts to plead the continuing discrimination claim where Martin claimed that Mennen's entire compensation and grade level system operated to discriminate against older employees. Specifically, Martin alleged in Count I that: "The Defendants have wrongfully failed to upgrade the Plaintiff's job classification and *have instituted a salary system*

which gives preference to employees based on age. . . ." (Emphasis added.) Consequently, we will vacate the magistrate's dismissal of the claim with prejudice and remand for the magistrate to permit further discovery by the plaintiff on that claim.[2]

IV.

For the above stated reasons, we will vacate the grant of summary judgment for Mennen in Martin's claim of age discrimination for failing to upgrade his position and vacate the magistrate's dismissal of the claim of continuing discrimination. Furthermore, we are confident that the magistrate will permit Martin to conclude discovery, without limitation as to the years (except as to relevance), in order to support the continuing discrimination claim as set forth in Count I of the amended complaint.

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[2] Mennen correctly noted that the Colgan deposition had not been entered in the record, and therefore, we have not considered it in our disposition of this case. We caution counsel that the general rule in this court is to require that any evidence, such as depositions or interrogatories, upon which the parties rely must be filed to be considered part of the record. Mere reference to the documents is insufficient. In addition, it is generally understood in this court and the district courts comprising this circuit, that when opposing a motion for summary judgment on the basis that additional discovery is necessary, the party will file a Rule 56(f) affidavit. This will eliminate the need for prescience on the part of the court hearing the motion, as occurred here.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Carol Los Mansmann
Circuit Judge

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ANDREW S. MARTIN, ET AL., Plaintiffs,	:	Civil Action No. 87-2546 (REC)
v.	:	
THE MENNEN COMPANY, ET AL., Defendants.	:	OPINION

This litigation involves plaintiff's (Andrew Martin) claim that he was discriminated on account of his age by his employer, The Mennen Company. In the instant motion, defendants have moved for summary judgment and plaintiff has cross-moved to compel defendants to provide certain discovery. The parties have consented to have me decide this motion, pursuant to 28 U.S.C. §636(c).

Plaintiff is 64 years old. He was hired in 1964, at age 39, by Mennen as a chief accountant, Grade XIV, at an annual salary of §11,200.00. As a chief accountant, plaintiff's duties included: corporate accounting, division accounting, accounts payable, payroll, fringe benefit accounting, cost accounting, budgets, marketing controls, internal controls, international division accounting and tax compliance. In December of 1967, plaintiff's job title was changed to accounting manager but his responsibilities remained the same. During the time period of 1964 through 1970, plaintiff received favorable job reviews.

In or about 1970, Mennen reorganized the finance department. During this reorganization, new specialized positions were created and new employees hired to staff these jobs. This reorganization affected plaintiff because some of his previous duties were transferred to individuals recently hired. Plaintiff claims that the new hires were all substantially younger and were either given higher grade classifications or were upgraded shortly after hiring.

By the end of 1971, plaintiff's reduced responsibilities included: corporate accounting, domestic accounting, payroll, accounts payable, fringe benefit accounting, and supervision of the cashier function. In April 1972, plaintiff was assigned some of the insurance duties previously assigned to the tax manager. Thereafter, plaintiff became involved with the forecasting of cash requirements and the investment of excess cash in money market instruments.

In August of 1973, plaintiff began to report to the Director of Corporate Finance, William Scalia. At this time, all the accounting and accounts payable duties were removed from plaintiff's position and assigned to another position. Plaintiff claims that these changes resulted in a substantial loss in his level of responsibility and amounted to a demotion.

In or about January of 1974, plaintiff applied for the position of International Controller. This application for an upgrade was denied. Plaintiff questioned this decision and was allegedly informed by L.D. Horne, Mennen's Chief Executive Officer, that he was not upgraded because his chemistry did not fit with the new finance

group that was being assembled and because plaintiff was not creative. Plaintiff, at the time, did not believe that age was a factor in his demotion nor that it was at the root of Mr. Horne's comments.

In 1979, plaintiff claims that he asked Mr. Scalia to upgrade his position. At that time, plaintiff alleges that Mr. Scalia advised him not to push his luck because he (Mr. Scalia) had previously protected him from being fired. Thereafter, plaintiff was given a handwritten letter composed by Mr. Scalia. In this letter, amongst other things, Mr. Scalia stated "You were to be fired in 1974, I prevented that; I fought for you which you don't appreciate . . . my written reviews were always more positive than my opinion . . . " (Plaintiff's exhibit G at 1). Additionally, Mr. Scalia stated, "I don't expect you to work like a kid looking for a promotion, but I do expect you to help me and protect me to work as hard for me as I have worked for you" (Plaintiff's exhibit G at 2).

In 1980, plaintiff's performance appraisal was prepared by Mr. Scalia. In this appraisal, Mr. Scalia stated " . . . despite Andy's age, he continues to work hard and puts in long hours necessary . . . " (Plaintiff's exhibit F at 2). Additionally, plaintiff claims that he was told by Mr. Scalia that younger employees at Mennen were treated more favorably than older employees. *Id.*

In or about late 1984 or early 1985, plaintiff asked Mr. Scalia to request an evaluation of his position. At Mr. Scalia's request, plaintiff prepared a job description of his duties and responsibilities. Plaintiff submitted the job description to Mr. Scalia who in turn submitted it to the personnel department for an evaluation.

In 1985, Michael F. Fadden, Director of Compensation and Benefits, evaluated plaintiff's position. Mr. Fadden reviewed the position description prepared by plaintiff and interviewed plaintiff and Mr. Scalia. Mr. Fadden then compared his evaluation of plaintiff's position with a salary consulting service known as the Salary Information Retrieval System (SIRS) published by Organization Resources Counselors, Inc. SIRS groups together jobs with comparable duties and their corresponding salaries to enable subscribers to ensure that their salary structure is competitive. After completing this anaysis, Mr. Fadden concluded that plaintiff's position could not properly be graded above a Grade 14.

Mr. Fadden reviewed his findings with Jerry J. Miller, Mennen's then Vice President of Employee and Community Relations Mr. Miller agreed with Mr. Fadden's conclusions and wrote a memorandum to Mr. Scalia informing him of the decision.

By memorandum dated September 20, 1983, Mr. Scalia again requested that the personnel department evaluate plaintiff's position to determine if it could be upgraded. Mr. Fadden reviewed this request but denied an upgrade on November 7, 1985 because he concluded that plaintiff's responsibilities had not changed since his position was evaluated earlier in 1983. Mr. Scalia advised plaintiff that he was turned down for an upgrade in early January of 1986.

In February of 1986, a 34 year old Grade 14 coworker of plaintiff was promoted to a Grade 15. Around this time, plaintiff claims that Mr. Fadden tried to induce

him to retire. Following these two events, plaintiff investigated the payroll records of the Mennen Company to ascertain how his status related to that of Mennen's younger employees. According to plaintiff, his investigation revealed that "younger employees in the Finance Division at Mennen had been hired at grade levels above his own and had been offered job level upgrades as part of a systematic effort to retain and promote younger employees at the expense of older employees" (Plaintiff's Brief at 8).

On June 30, 1986, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), claiming that he was wrongfully denied an upgrade in his job position with Mennen on or about January 5, 1986 because of his age. A companion verified complaint was filed with the New Jersey Division on Civil Rights on August 27, 1986. On May 4, 1987, plaintiff filed a complaint in Superior Court of New Jersey, Law Division, Somerset County. On June 26, 1987, Mennen removed this suit to the United States District Court for the District of New Jersey. On December 17, 1987, the EEOC made a determination that it would not proceed with the investigation of plaintiff's charge.

Defendants move here (i) for summary judgment on plaintiff's ADEA claims because plaintiff has allegedly failed to set forth a *prima facie* basis for these claims; (ii) to dismiss all of plaintiff's claims relating to events predating the failure to upgrade him in 1986 based upon the statute of limitations; (iii) for summary judgment on plaintiff's claims brought under the Fair Labor Standards Act, breach of contract and for intentional infliction of emotional distress (unopposed by plaintiff); and (iv) to

dismiss the individual defendants for failure to have named them in the EEOC charge.

Prematurity of Motion

At oral argument, plaintiff claimed that this motion was premature because several depositions of Mennen employees had yet to be taken. Plaintiff did not brief this argument nor was an affidavit filed pursuant to *Fed. R. Civ. P.* 56(f). Defendants responded at oral argument that plaintiff's failure to file a Rule 56(f) affidavit should preclude this court from ruling on this issue. Rule 56(f) provides:

> "Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

When a party opposes a summary judgment motion because he seeks discovery the correct procedure is for an affidavit to be filed "setting forth the reason why such discovery is needed and in particular what facts materal to his position are unavailable to him without the discovery". *Hancock Industries v. Schaeffer,* 619 F.Supp. 322, 327 (E.D.Pa. 1985). The affidavit must present reasons which are genuine and convincing, not speculative or even merely colorable. *Mid-South Grizzlies v. National Football League,* 720 F.2d 772, 779-80 (3d Cir. 1983), cert. den., 467 U.S. 1215, 104 S.Ct. 2657, 81 L.Ed.2d 364 (1984). Moreover, the discovery sought must be relevant to the plaintiff's

ability to counter the specific issue upon which summary judgment is sought. *Froid v. Berres*, 649 F.Supp. 1418, 1425 (D.N.J. 1986). Whether a motion should be continued pursuant to Rule 56(f) is within the sound discretion of the court. *Hancock Industries, supra* at 327.

Here, plaintiff failed to file a Rule 56(f) affidavit. Most courts which have considered the issue have held that filing an affidavit is necessary to properly raise a Rule 56(f) contention. *See e.g., Gray v. Udevitz*, 656 F.2d 588 (10th Cir. 1981); *Thi-Hawaii v. First American Financial Corp.*, 627 F.2d 991 (9th Cir. 1980); *Over the Road Drivers v. Transport Insurance Co.*, 637 F.2d 816 (1st Cir. 1980). However, this circuit has considered Rule 56(f) claims even without an affidavit in several circumstances. *See Hancock Industries, supra* at 327 (motion papers, even without an affidavit, and arguments made at hearing were sufficient); *Mid-South Grizzlies, supra* at 780 (arguments for Rule 56(f) relief contained in plaintiff's response to defendants' reply brief sufficient).

The question of prematurity was discussed in a conference call with the parties after the filing of this motion. And, thus the issue was known to the parties. Although it escapes me why plaintiff did not address the issue in the proper mode – by a Rule 56(f) affidavit – nevertheless, I will exercise my discretion to consider plaintiff's moving papers concerning his failure to obtain certain discovery and his comments at oral argument in the absence of a Rule 56(f) affidavit. However, I do not believe this motion, as a whole, should be continued pending discovery.

Rather, I will examine defendants' arguments individually and ascertain whether plaintiff needs additional discovery on these issues and whether such discovery is warranted to effectively refute these arguments.

Prima facie Age Discrimination Claim

Plaintiff alleges in the first count of his amended complaint that Mennen has continuously discriminated against him because of his age between 1971 and 1987. He claims that Mennen wrongfully failed to upgrade his job classification and has instituted a salary system which gives preference to employees based upon age. Specifically, plaintiff claims that over the years various portions of his responsibilities were parceled out to younger newly hired employees which effectively prevented him from being upgraded. Additionally, plaintiff asserts that certain comments made by his superiors concerning his age demonstrate Mennen's discriminatory intent.

Mennen argues that summary judgment is appropriate because plaintiff has failed to establish specific facts which show that he was denied an upgrade because of his age. However, even assuming, arguendo, that plaintiff has demonstrated a prima facie case of age discrimination, Mennen claims that he has not shown that the continuing violation theory is applicable. Thus, at most, plaintiff can only proceed as to his discrimination claim involving the alleged failure to promote in 1986.

The purpose of the summary judgment rule is the avoidance of the delay and expense of an unnecessary trial where the circumstances of the case, the applicable law and the facts, are ripe for such procedure. *Goodman v.*

Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976), cert. denied 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed.2d 748 (1977). According to *Fed. R. Civ. P.* 55, summary judgment may only be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Chippolini v. Spencer Gifts, Inc.*, 814 F.2d 593, 896 (3d Cir. 1987); *American Lung Association of New Jersey, v. Kean*, 670 F.Supp. 1285, 1287 (D.N.J. 1987). Material facts are identified by reference to the substantive law and an issue is genuine only "if the evidence is such that a reasonable jury could find for the nonmoving party." *Equipment Comm. Fin. Co. v C.I.T. Find. Serv. Corp.*, 812 F.2d 141, 144 (3d Cir. 1987). The moving party bears the initial burden of identifying evidence which shows the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265, 274 (1986). "Once that burden has been met, the nonmoving party must set forth "specific facts showing that there is a genuine issue for trial" or the factual record will be taken as settled and judgment will be entered as a matter of law." *American Lung Association of New Jersey, supra* at 1287, *quoting Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). (The nonmoving party may not rest upon the mere allegatons or denials of his pleadings in opposing summary judgment). However, if a claimant's theory is inherently implausible a greater evidentiary showing is required to meet this burden. *Kellam Energy Inc. v. Duncan*, 668 F.Sup. 86[illegible] 872 (D.Del. 1987). Importantly, the record must be viewed in the light most favorable to the party opposing the motion and all "inferences, doubts and issues of credibility" will be resolved

against the moving party, *E.E.O.C. v. City of Mt. Lebanon*, 842 F.2d 1480, 1485 (3d Cir. 1988). In the context of an age discrimination claim, the court must consider whether the evidence "*could* support an inference that the employer did not act for non-discriminatory reasons, not whether the evidence *necessarily* leads to that conclusion that the employer did act for discriminatory reasons." *Chippolini supra* at 900.

The Age Discrimination in Employment Act (ADEA) provides that:

> "It shall be unlawful for an employer (1) . . . to discharge or otherwise discriminate against any individual with respect to his compensation terms, conditions, or privileges of employment because of such individual's age . . . "

29 U.S.C. §623(a).

In an age discrimination case, the ultimate burden of proof rests with the plaintiff to demonstrate that age was a determinative factor in the employer's decision. *Chippollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir. 1987). However, while the plaintiff is not required to show that age was the employer's sole consideration he must prove that "age made a difference" in the decision. *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 (3d Cir. 1984). This showing may be made by either direct or indirect evidence. *Chippollini, supra* at 897.

Quite recently, the Third Circuit has reiterated that where a wrongful failure to promote is alleged, the *McDonnell Douglas* three stage procedure requires a plaintiff first to prove a prima facie case, *i.e.* to show that he is a member of a protected class, that he was qualified for

the position but nevertheless was rejected and that non-members of the protected class were treated more favorably than he was. *Roebuck v. Drexel University*, No. 87-1301 slip op. at 23 (3d Cir. July 26, 1988)[1] *citing, McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Once this burden is met, the employer must "articulate a legitimate, non-discriminatory reason for the complained-of action." *Roebuck, supra* at 24. The burden then shifts to the plaintiff to demonstrate that the reasons offered by the employer were a pretext for discrimination. *Id.* Importantly, a plaintiff must show that the employer's rationale is a fabricated justification for discrimination "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the *employer's proffered explanation is unworthy of credence*". *Chippollini, supra* at 898, *quoting Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1083, 67 L.Ed.2d 207 (1981) (emphasis added). Thus, after establishing his prima facie case, plaintiff can prevail by "indirect proof that the employer's reasons are pretextual without presenting evidence specifically relating to age." *Chippollini, supra* at 898.

First, this court must consider whether plaintiff has established a prima facie case of age discrimination.[2]

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[1] *Roebuck* was a race discrimination case. However, this circuit has long recognized "that the standards of proof under the [ADEA] are identical to those under Title VII and §1981". *Roebuck, supra* at 25 n.20.

[2] Unfortunately, plaintiff seems to have lost sight of his objective in this inquiry. Plaintiff must demonstrate Mennen's

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Defendants have stipulated that plaintiff is a member of a protected class and that he was denied an upgrade. The dispute here centers on whether plaintiff qualified for an upgrade and whether younger employees in similar circumstances were given upgrades.

Plaintiff claims he was qualified for an upgrade because tasks he originally performed were parceled out to newly hired individuals who ultimately were given upgrades. Essentially, plaintiff argues that his "recognized experience, intelligence and business sense", coupled with his ability to perform the tasks which have been given to other employees, qualifies him for an upgrade. According to plaintiff, the fact that younger employees assumed responsibilities which were previously assigned to him demonstrates Mennen's discriminatory intent. Plaintiff also notes that he was the oldest member of the finance department at the time and had never received an upgrade despite favorable performance reviews.

Defendants argue that plaintiff has presented no evidence that his position qualifies for an upgrade other than his subjective beliefs. Defendants assert that plaintiff's position was unique and that he has failed to demonstrate that his position was equivalent to other higher

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failure to upgrade his position in 1986 constitutes a prima facie case of age discrimination. Only if a prima facie case of discrimination is demonstrated in 1986 can plaintiff hope to proceed with his continuing violations claim. Here, however, plaintiff places little emphasis on the 1986 incident. Rather, plaintiff concentrates almost exclusively on incidents occurring prior to 1986.

graded positions. Additionally, defendants argue that plaintiff has presented no evidence that younger employees in similarly situated positions received upgrades.

I agree with defendants that plaintiff has failed to demonstrate that he is qualified for an upgrade to grade level 15. Plaintiff has presented no evidence comparing his duties with other employees holding grade level 15 positions. Plaintiff also has failed to show or even address how he has fulfilled the criteria established by Mennen for obtaining a grade level 15 upgrade. (See defendants' exhibit 13).[3] Plaintiff's reliance on the 1971 reorganization and its effect on his duties is simply not relevant to his claim of discriminatory treatment in 1986.

However, because plaintiff has yet to take the depositions of several Mennen employees or to take discovery regarding the documents being produced, pp. 20-21, *infra*, it would be premature to dismiss plaintiff's claim at this juncture, without allowing this additional discovery.[4] Certainly, after such additional discovery, if plaintiff cannot make a *prima facie* case, defendants' motion should be renewed. Thus, defendants' motion for summary judgment to dismiss plaintiff's 1986 age discrimination claim will be denied without prejudice.

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[3] Because of this finding, it is unnecessary for this court to consider whether 1) younger employees were treated more favorably, 2) Mennen has advanced a legitimate non-discriminatory rationale for its decision or whether 3) plaintiff can show that Mr. Mennen's rationale was a pretext.

[4] *See, infra*, p. 6-7.

Continuing Violations

Plaintiffs in New Jersey must file a claim alleging a violation of the ADEA with the EEOC "within 300 days after the alleged unlawful practice occurred" 29 U.S.C. §626(d). This limitation period is necessary to "guarant[y] the protection of the civil rights laws to those who promptly assert their rights [and to] protect employers from the burden of defending claims from employment decisions that are long past". *College v. Ricks*, 449 U.S. 250, 256-57, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980).

Here, plaintiff's charge filed with the EEOC on June 30, 1986 alleges only that Mennen's denial of his request to have his position reclassified on or about January 5, 1986 constitutes age discrimination. However, in plaintiff's complaint he claims that the defendant has continuously discriminated against him because of his age since 1971. These prior acts of alleged discrimination occurred outside of the ADEA's filing period. As such, plaintiff is barred from litigating these claims unless he can demonstrate that they are part of a "continuing violation". Because plaintiff has not done so nor could he with additional discovery, defendants are entitled to summary judgment on plaintiff's age discrimination claims prior to the 1986 EEOC charge.

Under the continuing violation theory a plaintiff may "complain about a series of employer actions conducted pursuant to a policy or practice of discrimination as long as [he] files a timely complaint as to one of these actions." *Porta v. Rollins Environmental Services, (N.J.) Inc.*, 654 F.Supp. 1275, 1281 (D.N.J. 1987) aff'd 845 F.2d 1014 (3d Cir. 1988). Before determining whether the continuing

violation theory applies, the court must first identify the "unlawful employment practice" of which the paintiff complains. *Fuchilla v. Prockop*, 682 F.Supp. 247, 257 (D.N.J. 1987) *quoting Delaware State College, supra* at 257. The plaintiff may not simply point to "isolated or sporadic acts of intentional discrimination", *Porta, supra* at 1281 or seek to "resurrect and litigate grievances long past by merely appending them to a current complaint". *Erdmann v. Bd. of Ed. Union County Regional High School District 1*, 541 F.Supp. 388, 393 (D.N.J. 1982). Rather, the plaintiff must show by a preponderance of the evidence that the employer's discriminmatory practice was directed at the *class* of which plaintiff was a member and was part of the company's "standard operating procedure". *Jewett v. International Telephone and Telegraph Corporation*, 653 F.2d 89, 91 (3d Cir. 1981) cert. den. 454 U.S. 969, 102 S.Ct. 515, 70 L.Ed.2d 386 (1981), *quoting Teamsters v. United States*, 431 U.S. 324, 336, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). To withstand a motion for summary judgment "a plaintiff must at minimum identify the policy or practice upon which the claim of continuing violation is based and demonstrate at least some factual support for that claim" *Erdman, supra* at 393.

Judge Whipple has explained that

> "The continuing violation theory can best be understood by reference to the practical consideration which justifies this expansion of the Title VII filing periods. Where the instances of employment discrimination charged all involve a particular company policy or practice, the past and otherwise stale claims may be litigated without need of delving into the specifics of each employment decision. The defendant employer is not burdened with the necessity of

> justifying each particular instance of alleged discrimination; but rather, may successfully defend against all the claims by justifying the practice challenged as a whole. The congressional intent that employers not be unreasonably burdened with preserving for years complete records of each and every employment decision is not frustrated when the continuing violation theory is held to its proper scope. Similarly, plaintiff employees can meet their burden of establishing the existence of a continuing violation without reference to the specific circumstances of particular incidents by showing with documents or testimony that the employer maintains a discriminatory policy or procedure, or perhaps by demonstrating statistically that a discriminatory practice is followed, *see e.g., Davis v. Califano*, 613 F.2d 957 (D.C.Cir. 1979).

Id. at 393.

Here, plaintiff has failed to show any factual support or even claim that Mennen has discriminated against older workers as a class as part of its standard operating procedure. Rather, plaintiff has focused on isolated incidents over the course of fifteen years which he asserts demonstrates Mennen's discriminatory intent. Essentially, plaintiff alleges that because Mennen discriminated against him in a manner which was "intentional, pervasive and continuing from the 1971 reorganization to the last date of his employement" (Plaintiff's Brief at 19) he should be permitted to invoke the continuing violation theory. Even assuming, however, that plaintiff's assertions are true it is clear that the continuing violation theory is inapplicable. This theory is designed to attack a company practice of discriminating against a *class* of employees over the course of many years without delving

into the specifics of each discriminatory act. The key is that a plaintiff must point to a discriminatory company policy against a class of employees not merely isolated acts of discrimination directed at one individual. While it is of course possible that a company policy could be directed at a class of one, *i.e.*, only one woman in a department, *see Porta, supra* at 1282, such is not the case here.

Therefore, because plaintiff has failed to show *any* factual support for the proposition that Mennen discriminated against older workers as a class he may not invoke the continuing violations theory. While this result may seem harsh, it must be emphasized that plaintiff always had the opportunity to file a timely charge of discrimination after each incident occurred at Mennen. His failure to do so over the past fifteen years will preclude him from resurrecting and litigating these past grievances under the guise of the continuing violation theory. Plaintiff's claims of discrimination occurring before his 1986 EEOC charge are dismissed with prejudice.

Plaintiff's Failure to Name the Individual Defendants in the EEOC Charge

Generally, parties not named in an EEOC charge cannot later be sued in federal court for violation of the ADEA. "The purpose of this requirement is to ensure that each defendant has knowledge of the alleged violation and a chance to resolve this dispute amicably before litigaton". *Bumpers v. International Mill Services, Inc.*, 595 F.Supp. 166, 170 (E.D.Pa. 1984).

However, exceptions to this general rule are permitted where certain prerequisites are satisfied. Both parties have relied on *Glus v. G.C. Murphy Company*, 562 F.2d 880 (3d Cir. 1977) in arguing that the four part test enunciated in that Title VII case is applicable to this ADEA litigation. While standards in Title VII and ADEA litigation are often interchangeable, *see Roebuck, supra* at 25 n.20, such is not the case here. *Glus* and the cases adopting its four part test have never been applied in this circuit in an ADEA context. Alternatively, several courts, including one in this circuit, have adopted a separate two part test to deal specifically with this issue in ADEA litigation. This test permits plaintiffs to bring age discrimination suits against defendants not named in prior administrative proceedings where "there is substantial identification between the defendants not named in the prior administrative charge and the defendants who were so named and ii) the defendant not named in the administrative charge was aware of the administrative proceedings" *Id.* at 170[5]. *See also Gunning v. San Antonio Teachers Credit Union*, 652 F.Supp. 697, 698 (W.D.Tex. 1987); *Lettich v. Kenway*, 590 F.Supp. 1225, 1227 (D.Mass 1984); *Rio v. Presbyterian Hospital in the City of New York*, 561 F.Supp. 325, 326 (S.D.N.Y. 1983); *Allen v. Colgate-Palmolive Co.*, 539 F.Supp. 57, 69 (S.D.N.Y. 1981). The rationale for excusing strict compliance with the statute is twofold:

---

[5] I find it disturbing that defendants quoted almost verbatim a passage of Judge Kelly's opinion in *Bumpers* without citing that case to this court and then proceeded to ignore its holding concerning ADEA plaintiffs. *Compare* defendants' brief at 37 with *Bumpers supra* at 170.

> "[First] requiring technical compliance with the statute would not further the policies that underlie the notice requirement of section 626(d). [Second] [a]n unnamed defendant who is aware of the administrative proceedings and whose interest are aligned with another defendant who was named in those proceedings is likely to have had an opportunity before litigation to contribute to the amicable resolution of the dispute."

Gunning, supra at 698. In light of the foregoing, I believe it is more appropriate to evaluate defendants' motion under the *Bumpers* ADEA test than the *Glus* Title VII test.

Here, I find that there is "substantial identity" between the individual defendants and Mennen. This is consistent with the general view that employees in a supervisory capacity may be identified for the purposes of ADEA litigation with their corporate employer. *See Rio, supra* at 326; *Allen, supra* at §9, *see also, Lettich, supra* at 1227 (partners in a law firm have substantial identity with the firm).

Next, I must consider whether the individual defendants had notice of the administrative proceedings. The burden is on corporate employees not named in an EEOC charge to demonstrate that they did not have notice. *Rio, supra* at 326; *Allen, supra* at 69. Plaintiff in his brief claims that the individual defendants were aware of the individual proceedings from the outset. Defendants do not dispute this statement either in their brief or in affidavits submitted by the parties themselves. Thus the individual defendants have failed to sustain their burden that they were not notified about the EEOC proceedings. Accordingly, the individual defendants motion for summary judgment is denied.

Plaintiff's Cross-Motion to Compel Discovery

Plaintiff claims that defendants have failed to supply a complete answer to Interrogatory No. 11. Interrogatory No. 11 requires defendants to provide the following information:

> 11. With respect to all employees within any Morris County Mennen Company facility having a grade level of 14 and above, set forth the following in detail and with specificity:
>
> (a) their name, address and current age;
>
> (b) their age at hiring with the Mennen Company;
>
> (c) the educational background of each person identified;
>
> (d) supply the salary history from the time of hiring to date and include benefits and bonuses of each individual so identified;
>
> (e) supply the performance appraised/summary for each individual identified since 1971.

Plaintiff asserts that defendants have failed to provide information concerning employees having a grade level above 15. Plaintiff also claims that defendants have failed to designate the grade level of the individual named and provided only information regarding employees having a grade level 14 or 15.

Because I have dismissed plaintiff's claims purportedly arising under the continuing violations theory, the only relevant issue is whether plaintiff, with additional discovery can demonstrate a prima facie case of age discrimination in 1986. Thus, information concerning employees at grade levels 14 and 15 their responsibilities,

and age during this recent time frame is relevant. However, I find that defendants have already supplied or made available to plaintiff sufficient information to document a 1986 age discrimination claim (if one exists). See Defendants' Reply Brief Exhibit 6. Documents prior to 1982 or concerning employees above grade level 15 which plaintiff seeks are simply not necessary. Defendants must though designate the grade level of each individual previously named within twenty days of the date of this Opinion and Order.

Conclusion[6]

In conclusion, defendants' motion for summary judgment is granted in part and denied in part. Specifically, because the continuing violation theory is inapplicable, summary judgment is granted on all claims prior to the 1986 EEOC charge. However, defendants' motion for summary judgment on the 1986 claim is denied without prejudice. The individual defendants' motion for summary judgment is denied. Plaintiff's cross-motion to compel answers to Interrogatory 11 is granted in part and denied in part as explained above.

/s/ Freda L. Wolfson
Freda L. Wolfson
United States Magistrate

Dated: August 17, 1988

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[6] Plaintiff does not object to summary judgment being granted in favor of defendants as to their claims brought under the Fair Labor Standards Act, for breach of contract, and for intentional infliction of emotional distress. Accordingly, these claims are dismissed with prejudice.

APPENDIX C
Filed JUN 14 1989

WILLIAM T. WALSH
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ANDREW S. MARTIN,	:	Civil Action
	:	No. 87-2546
Plaintiff,	:	(JCL)
v.	:	
THE MENNAN COMPANY, ET AL.,	:	MEMORANDUM AND ORDER
Defendants.	:	

This litigation involves plaintiff's contention that he was discriminated against by his employer on the basis of age, in violation of 29 U.S.C. § 623, the Age Discrimination in Employment Act (ADEA). The parties have consented to have this Court decide the motion pursuant to 28 U.S.C. § 636(c).

The only claim for relief remaining in this action is the claim that the plaintiff was wrongfully denied an upgrade in his position in 1986. All other claims have previously been dismissed with prejudice by the Stipulation of Dismissal of March 22, 1988 and this Court's Order of August 17, 1988.

The defendants have moved for summary judgment to dismiss the remaining claim. This same motion had been brought previously. It was denied without prejudice to allow further discovery to be taken. All discovery is

complete. The issue is now ripe for decision and, for the reasons stated herein, will be granted.

ENTERED
ON
THE DOCKET
ON 6-14 1989
WILLIAM T. WALSH, CLERK
BY /s/ ILLEGIBLE
(Deputy Clerk)

This Court has already set forth the factual background to the case. Opinion at pp. 1-6 (August 17, 1988). Those facts are incorporated herein by reference. Any additional facts necessary to address the current motion are discussed *infra*.

I.

Summary Judgment

Under *Fed. R. Civ. P.* 56(c) summary judgment can be granted if there is no genuine issue on a material fact and the movant is entitled to judgment as a matter of law. *See Chippolini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir. 1987), *cert. dismissed*, ___ U.S. ___, 108 S.Ct. 26, 97 L.Ed.2d 815 (1987).

A fact is material only if, with reference to the substantive law, it will affect the outcome of the action. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). An issue is genuine if a reasonable jury could find in favor of the nonmovant. *Id.*

Regardless of which party bears the burden at trial, on a summary judgment motion the movant must initially show that there is no genuine issue of material fact.

See Chippolini. This can be done by showing that the admissible evidence currently before the court would be insufficient for the nonmovant to meet its burden of proof at trial. *See Celotex v. Catrett,* 477 U.S. 317 (1986). The record must, at all times in summary judgment motions, be construed in the light most favorable to the nonmovant. *See E.E.O.C. v. City of Mt. Lebanon,* 842 F.2d 1480 (3d Cir. 1988).

Once the movant has met its burden, the nonmovant must present " . . . specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P.* 56(c). *See Anderson* at 248. It is insufficient for the nonmovant to rest upon its pleadings. *See Anderson.*

A defendant in an ADEA case can prevail on a summary judgment motion in one of two ways. The defendant can prevail by showing that the plaintiff cannot establish a genuine issue of fact on one or more elements of the plaintiff's *prima facie* case. *See Spangle v. Valley Forge Sewer Authority,* 839 F.2d 171 (3d Cir. 1988). Alternatively, the defendant can prevail by showing that there was a nondiscriminatory basis for its actions and by showing that the plaintiff cannot demonstrate a genuine issue of material fact as to whether this basis was merely a pretext for discrimination. *Id.*

II.

Prima Facie Age Discrimination Claim

To prevail on an ADEA claim, the plaintiff must first make out the three prongs of a *prima facie* case. Plaintiff must show that he was a member of the protected class,

that he was qualified for the position but was rejected and that non-members of the protected class were treated more favorably than he was. *See Roebuck v. Drexel University,* 852 F.2d 715 (3d Cir. 1988) *citing, McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). While *Roebuck* was a race discrimination case, the standards of proof under ADEA are the same. *See Roebuck.*

In the case at bar, the plaintiff has failed to establish one element of the *prima facie* case; that non-members of the protected class who were in comparable positions were treated more favorably than he was. The motion must therefore be granted and the case dismissed.[1]

As to the first criteria, there is no dispute that plaintiff was a member of the protected class. In connection with the second criteria, in the context of establishing a *prima facie* case, plaintiff has presented the Court with sufficient information to show that he was qualified for an upgrade. William C. Scalia, Mr. Martin's supervisor, wrote on a performance evaluation form dated October 24, 1985, "Andy has achieved his potential. I do, however, believe his current position should be upgraded to XV." Brief In Opposition To Defendants' Motion For Summary Judgment, May 1, 1989, Exhibit G. Under the word "Approval" that document is signed by three additional

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[1] Because the Court finds that a *prima facie* case can not be met, the Court will not address whether the defendant has successfully rebutted a presumption of discrimination by presenting a no-discriminating reason for the failure to upgrade the position. *See Roebuck.* The Court will also not address whether plaintiff has shown that any non-discriminatory reason was just a pretext. *Id.*

people; M. Marcus, Vice-President of Human Resources, J. Sichel, Executive Vice President and Chief Financial Officer, and L.D. Horne, Chairperson and Chief Executive Officer.

Furthermore, Mr. Scalia testified at his deposition that he recommended Mr. Martin for a promotion. Deposition of William C. Scalia, October 20, 1988, p. 49, lines 10-12 *in* Exhibits to Brief In Support of Defendants' Renewed Motion For Summary Judgment, Volume II, Exhibit 22.

The defendants have presented various evidence to rebut this information. For example, Mr. Scalia testified that the performance appraisal was not a formal recommendation for a promotion. *Id.* at p. 47, lines 6-10. In summary judgment motions, however, courts do not weigh the evidence. *See Anderson*. Rather, all inferences and doubts must be construed in favor of the non-movant. *See City of Mt. Lebanon*. For that reason and in light of the evidence noted, the Court finds that the plaintiff has established a *prima facie* case with respect to Mr. Martin's qualifications.

Mr. Martin has not, however, shown that non-members of the class were treated more favorably than he was. Neither *Roebuck* nor *McDonnell Douglas Corp.* explicitly state that non-members of the class who were treated more favorably must have been in comparable positions. Both cases, however, recognize that the precise elements of a *prima facie* case will vary in different factual scenarios. Here, in the context of a failure to upgrade a position, the plaintiff must show as part of his *prima facie* case that

the non-members were in comparable positions. *See Epstein v. Secretary, U.S. Dept. of Treasury,* 739 F.2d 274 (7th Cir. 1984). *Cf. Kunda v. Muhlenberg College,* 621 F.2d 532 (3d Cir. 1980) (in a case involving failure to grant tenure to a woman based on sex discrimination the plaintiff must show that comparable males were granted tenure).

Mr. Martin's counsel has claimed that two non-members of the class, Mike Oravec and Janet Malcolm, were upgraded from Grade 14 to Grade 15. Counsel further claims that Ms. Malcolm supervised two employees while Mr. Martin supervised four. As support for these claims, counsel cites to portions of Mr. Oravec's and Ms. Malcolm's depositions. However, neither the deposition transcripts *in toto* nor the pertinent sections of those transcripts have been provided to the Court either on this motion or on the previous motion for summary judgment. These depositions are simply not part of the record before this Court. The plaintiff's bare citations to the depositions do not place before this Court evidence which would be admissible at trial and, therefore, cannot be considered. *Fed. R. Civ. P.* 56. *See G.C.S., Inc. v. Foster Wheeler Corp.,* 437 F.Supp. 757 (W.D.Pa. 1975). Since they cannot be considered, there is no evidence before the Court to find that the last prong of the *prima facie* case has been met.

Assuming, *arguendo,* that this information was before the Court in the form of competent evidence, Mr. Martin still could not prevail. He has failed to show that Mr. Oravec and Ms. Malcolm's positions were comparable to his. The threshold set is not stringent. The Court does not require a showing that the positions were identical. Nor

does the Court require a showing that they were substantially the same. The Court merely requires a showing that they were comparable. The bare statement that Ms. Malcolm supervised half the number of people that Mr. Martin did is insufficient to meet this requirement. In the absence of a showing that the non-members of the class who were treated more favorably were in comparable positions, or similarly situated, one *prima facie* case has not been met. *See Jalil v. Avdel Corp.*, No. 87-5538, slip op. at 15 (3d Cir. May 4, 1989).

Mr. Martin has not established all of the elements of a *prima facie* case. For that reason, summary judgment in favor of the defendants will be granted.

ORDER

IT IS on this 14th day of June, 1989,

ORDERED that defendants' motion for summary judgment is granted.

/s/ Freda L. Wolfson
Freda L. Wolfson
United States Magistrate

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5571

ANDREW S. MARTIN,
ANNA D. MARTIN

vs.

THE MENNEN CO., GEORGE S. MENNEN,
L. DONALD HORNE, LEONARD J. SICHEL,
and WILLIAM C. SCALIA

Andrew S. Martin
Appellant

SUR PETITION FOR REHEARING

Present: HIGGINBOTHAM, *Chief Judge*,
SLOVITER, BECKER, STAPLETON, MANSMANN,
GREENBERG, HUTCHINSON, SCIRICA, COWEN, and
NYGAARD, *Circuit Judges* and KOSIK, *District Judge*.

The petition for rehearing filed by appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

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*Judge Kosik is limited to vote for rehearing before the original panel only.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

MAR 27 1990

APPENDIX E

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September 12, 1989

Salvatore P. DiFazio, Esq.
Golden, Rothschild, Spagnola & DiFazio
1011 Route 22 West
P.O. Box 897
Somerville, New Jersey 08876-0897

Re: *Martin v. Mennen*

Dear Sal:

We have received your letter of September 8, 1989 in response to our letter of August 29, 1989 requesting that you designate the contents of the Appendix in accordance with Fed. R. App. P. 30(b). We request further clarification of your comments regarding the Appendix.

You state that "We will in all likelihood rely upon the entirety of the record below, including portions of all depositions taken." Please advise whether this means that you intend to include the entire record in your Appendix, or whether you intend to make use of the deferred appendix procedure outlined in Fed. R. App. P. 30(c). As you know, the Third Circuit discourages the use of a deferred appendix. *See* Rules of the United States Court of Appeals for the Third Circuit, Rule 10(4).

I note that you intend to include "portions of all depositions taken." I assume you refer only to depositions included in the record and not to the depositions of Oravec and Malcolm which, as noted on page 6 of Judge Wolfson's June 14, 1989 Opinion, are not part of the record. Clearly, depositions that are not part of the record cannot be designated for inclusion in the Appendix. If we have to move for an order striking those depositions from the Appendix, you may be liable for our costs and fees.

We would prefer to reach an agreement as to the contents of the Appendix before it is filed on October 2, 1989. This will serve the interest of the Court in having a single integrated Appendix before it. This will also benefit the parties by allowing a consistent form of citation throughout the proceedings. Accordingly, we urge you to designate the Appendix prior to October 2, 1989 so that we may designate additional materials, if any, and honor the Court's preference for a Joint Appendix. Please call me after you have reviewed this letter so we can discuss its contents.

Very truly yours,

/s/ Bruce P. McMoran
BRUCE P. McMORAN

BPM/leb
cc: Anthony J. Olivo, Esq.

APPENDIX F

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FILE NO.

September 29, 1989

McMoran and Palmieri
Bruce McMoran, Esq.
P.O. Box 560
Lebanon, NJ 08833

Re: Martin vs. Mennen

Dear Mr. McMoran:

In my previous correcpondence dated September 8, 1989, I advised that I intended to rely upon the entire record below. You responded to my letter on September 12, 1989 by advising me that you would object to any reference being made to the depositions of Janet Malcolm and/or Michael Oravec. We have not done so.

In any event we have not, in any way, attempted to delay and have, in fact, provided you with the proposed appendix which comports with your request.

Thank you for your attention in this matter.

Very truly yours,

Salvatore P. DiFazio
SPD/dmd
Enc.
By Fax – 236-7450